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SHAMSUL SAAD

v.

TENGKU DATO' IBRAHIM PETRA TENGKU INDRA PETRA & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
MAH WENG KWAI JC
[CIVIL SUIT NO: D-22 NCC-735-2009]
2 APRIL 2010

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CIVIL PROCEDURE: *Striking out - Writ and statement of claim - Application for - Whether statement of claim disclosed reasonable causes of action against 1st to 4th defendants based on allegations of fraud, breaches of fiduciary and statutory duties and negligence - Whether plain and*

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obvious case for striking out statement of claim as disclosing no reasonable cause of action - Whether plaintiff has established a prima facie case of locus standi to maintain present suit - Defendants entered unconditional appearance - Whether they cannot now complain that plaintiff does not have locus standi

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COMPANY LAW: *Derivative action - Fraud on the minority - Suit against directors - Alleged fraud on the minority - Whether a requirement in a pleading that defendants are in control of Board of Directors of aggrieved company - Whether a requirement for a demand to be made for*

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aggrieved company to seek legal remedies against controlling Directors before a minority shareholder can commence legal proceedings

The plaintiff filed a statement of claim for *inter alia*, a declaration that the 1st to 4th defendants had breached their duty of care, statutory and fiduciary duties owing to the 5th defendant;

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declarations that the divestment of certain Petra Energy Bhd shares by the 1st and 4th defendants had breached the shareholders mandate dated 26 April 2007 and the methods of divestment set by the Board of Directors on 18 November 2009; an order prohibiting the 1st to 4th defendants from divesting the remaining shares of

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Petra Energy Bhd until the plaintiff requisitions an Extraordinary General meeting (EGM) of the 5th defendant or final settlement of this action whichever is the earlier, and an order for damages to be assessed for the losses suffered by the 5th defendant resulting from the unauthorized divestment of shares. On 14 January 2010 the 1st

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and 2nd defendants jointly filed an application (encl. 16) under

O. 18 r. 19(1)(a) Rules of the High Court 1980 (RHC) to strike out the plaintiff's writ of summons and statement of claim on the grounds that it does not disclose a reasonable cause of action and that the plaintiff has no *locus standi* to bring this action as a derivative action for and on behalf of the 5th defendant. The 1st and 2nd defendants claimed that the plaintiff failed to plead that the 5th defendant which has been allegedly wronged, is unable to sue because the 1st to 4th defendants are in control of the Board of Directors of the 5th defendant and would not allow the 5th defendant to bring the action in its name. They also claimed that the plaintiff failed to plead that a request had been made to the Board of Directors of the 5th defendant for an action to be brought against the 1st to 4th defendants in its name prior to the filing of the action. On 15 January 2010, the 3rd and 4th defendants also jointly filed an application (encl. 20) seeking a similar order against the plaintiff based on identical grounds.

Held (dismissing the 1st to 4th defendant's applications with costs):

(1) This was not a proper case for the court to exercise its discretionary power to strike out the plaintiff's claim under O. 18 r. 19(1)(a) RHC as the statement of claim has disclosed reasonable causes of action based on fraud, breaches of fiduciary and statutory duties and negligence allegedly committed by the 1st to 4th defendants to the detriment of the 5th defendant. The statement of claim raises important questions of law to be tried. The statement of claim is adequate and not defective as the plaintiff has pleaded the requisite matters including that he is a shareholder of the 5th defendant and was bringing this action as a derivative action in his capacity as a minority shareholder, and for the benefit of the 5th defendant and has cited the wrongdoers as the defendants. *Abdul Rahim bin Aki @ Mohd Haki v. Krubong Industrial Park (Melaka) Sdn Bhd and 5 Others* (foll). (paras 12-12.7 & 12.13)

(2) As the 1st to 4th defendants filed an unconditional Memorandum of Appearance they cannot now complain that the plaintiff does not have *locus standi*. *Alor Janggus Soon Seng Trading Sdn. Bhd. & 6 Ors v. Sey Hoe Sdn. Bhd. & 2 Ors.* (foll); *Leong Peng Kheong & Anor v. Downtree Properties Sdn Bhd* (refd); *Nga Sheau Sheau v. United Merchant Finance Bhd* (refd); *Dato' Hari Menon v. Texas Encore LLC & Ors* (refd); *Lim Chon Beng v. Pulau Kembar Sdn Bhd* (refd). (para 12.7)

(3) This case comes within the exceptions to the rule in *Foss v. Harbottle, ie*, that the cause of action is based on the alleged fraud on the minority and in the interests of justice. There is no requirement in a pleading based on the alleged fraud on the minority to plead that the defendants are in control of the Board of Directors of the aggrieved company. There is also no requirement for a demand to be made for the aggrieved company to seek legal remedies against the controlling Directors before a minority shareholder can commence legal proceedings. *Chio Tan Seng and Others v. Chong Chai Huat and Others* (refd). (paras 12.15 & 12.16)

(4) As the statement of claim is not defective, there was no need for the court to exercise its power to direct an amendment to be made to the statement of claim. In any event, the alleged defective pleadings or the lack of pleadings do not occasion any disadvantage or cause any prejudice to the 1st to 4th defendants as the statement of claim is sufficient for the 1st to 4th defendants to know the causes of action relied upon and for them to meet the case appropriately in their defence. Accordingly, the 1st to 4th defendant's applications (encls. 16 & 20) were dismissed with costs. (paras 12.19-13)

Case(s) referred to:

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA ***(foll)***

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 SC ***(foll)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 ***(refd)***

Biala Pty Ltd v. Mallina Holdings Ltd (No 2) [1993] 11 ACLC 1082 ***(refd)***

Chio Tan Seng & Ors v. Chong Chai Huat & Ors [1997] 4 CLJ Supp 116 HC ***(refd)***

Dato' Hari Menon v. Texas Encore LLC & Ors [2005] 2 CLJ 688 ***(refd)***

Foss v. Harbottle [1843] 2 Hare 461 ***(refd)***

Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Anor [1998] 3 CLJ 253 CA ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(foll)***

Leong Peng Kheong & Anor v. Dawntree Properties Sdn Bhd [2002] 1 CLJ 602 ***(refd)***

Lim Chon Beng v. Pulau Kembar Sdn Bhd [2005] 6 CLJ 24 ***(refd)***

Nga Sheau Sheau v. United Merchant Finance Bhd [2004] 3 CLJ 243 ***(refd)***

Prudential Assurance Co Ltd v. Newman Industries Ltd & Ors (No 2) [1982] 1 AU ER 354 ***(refd)***
Shahidan Shafie v. Atlan Holdings Bhd & Anor [2005] 3 CLJ 793 CA ***(refd)***
Tan Guan Eng & Anor v. Ng Kweng Hee & Ors [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74 HC ***(refd)***

Legislation referred to:
Capital Markets And Services Act 2007, s. 354(1)(b)(i), (2)(h), (k), (3)(a), (b), (8), (9)
Companies Act 1965, s. 132(1)(1F)
Rules of the High Court 1980, O. 1A, O. 18 rr. 7(1), 12(1)(a), (b), (2), 15(1), 19(1)(a), O. 20 r. 5

For the plaintiff - Wong Kian Kheong (Karen Lee & Chris Lim with him); M/s Chris Lim Ting & Partners
For the 1st-4th defendants - Azhar Azizan Harun (Kelvin Seet with him); M/s Cheang & Ariff
For the 5th defendant - Bobby Chew; M/s Chris Koh & Chew

Reported by Susheila Sreedharan

JUDGMENT

Mah Weng Kwai JC:

[1] The plaintiff by his statement of claim dated 21 December 2009 prayed for *inter alia*, a declaration that the 1st to 4th defendants had breached their duty of care, statutory and fiduciary duties owing to the 5th defendant; a declaration that the divestment of 10,500,000 Petra Energy Bhd shares by the 1st and 4th defendants had breached the shareholders mandate dated 26 April 2007; a declaration that the divestment of 48,800,000 Petra Energy Bhd shares by the 1st to 4th defendants had breached the methods of divestment set by the Board of Directors on 18 November 2009; an order prohibiting the 1st to 4th defendants from divesting the remaining 29.59% shares of Petra Energy Bhd until the plaintiff requisitions an Extraordinary General meeting (EGM) of the 5th defendant or final settlement of this action whichever is the earlier, and an order for damages to be assessed for the losses suffered by the 5th defendant resulting from the unauthorized divestment of shares.

[2] On 14 January 2010 the 1st and 2nd defendants jointly filed their summons in chambers (encl. 16) for an order under O. 18 r. 19(1)(a) Rules of the High Court 1980 (RHC) that the plaintiff's writ of summons and statement of claim be struck out with costs on the grounds that the statement of claim does not disclose a reasonable cause of action and that the plaintiff has no *locus standi* to bring this action as a derivative action for and on behalf of the 5th defendant. The 1st and 2nd defendants claimed that the plaintiff has failed to plead that the 5th defendant which has been allegedly wronged, is unable to sue because the 1st to 4th defendants are in control of the Board of Directors of the 5th defendant and would not allow the 5th defendant to bring the action in its name.

[3] The 1st and 2nd defendants also claimed that the plaintiff has failed to plead that a request had been made to the Board of Directors of the 5th defendant for an action to be brought against the 1st to 4th defendants in its name prior to the filing of the action.

[4] On 15 January 2010, the 3rd and 4th defendants also jointly filed a summons in chambers (encl. 20) seeking a similar order under O. 18 r. 19(1)(a) RHC against the plaintiff based on identical grounds.

The 1st To 4th Defendants' Case

[5] Counsel for the 1st to 4th defendants submitted that as this action is supposedly a derivative action the plaintiff will have to come within an exception to the rule in *Foss v. Harbottle* [1843] 2 Hare 461 to be able to maintain it. The rule in *Foss v. Harbottle* is that when a company is wronged, the cause of action lies with the company and not with a shareholder. The plaintiff can only bring a derivative action if it falls within an exception to the rule in *Foss v. Harbottle*.

[6] In particular, counsel for the 1st to 4th defendants submitted that the plaintiff has failed to plead the following:

a. facts which would show that this action falls within an exception to the rule in *Foss v. Harbottle*;

b. that this action is brought for the benefit of the 5th defendant, and the shareholders of the 5th defendant (including the plaintiff) other than the 1st to 4th defendants;

c. that the 1st to 4th defendants are in control of the 5th defendant by commanding the majority of the votes at a general meeting of the 5th defendant;

d. that this action could not have been filed by the 5th defendant itself as it is under the control of the 1st to 4th defendants; and

e. that the plaintiff has failed to cause the 5th defendant to commence this action itself.

[7] Counsel for the 1st to 4th defendants also submitted that besides the alleged breaches of the duty of care, statutory and fiduciary duties of the 1st to 4th defendants, there is no allegation that the 1st to 4th defendants had committed any fraud on the minority at all. The plaintiff has not shown that the 1st to 4th defendants are in control of the 5th defendant and that they would have blocked any attempt by the 5th defendant to commence an action against the 1st to 4th defendants for their alleged wrongdoings. Counsel also submitted that without showing that the 1st to 4th defendants are in control of the 5th defendant, the plaintiff has no right to bring this derivative action.

The Plaintiff's Case

[8] Counsel for the plaintiff submitted that there is no statutory requirement setting out how a minority shareholder's action ought to be pleaded. The statement of claim has disclosed reasonable causes of action against the 1st to 4th defendants based on allegations of fraud, breaches of fiduciary and statutory duties and negligence. The statement of claim has been adequately pleaded under O. 18 r. 7(1), r. 12(1)(a), (b), (2) and r. 15(1) RHC. The statement of claim is not defective as the plaintiff in the title of the writ of summons has cited the plaintiff as "acting as a minority shareholder of Petra Perdana Bhd and bringing this action for the benefit of Petra Perdana Berhad", the 5th defendant.

[9] The plaintiff relies on fraud on the minority which is an exception to the rule in *Foss v. Harbottle* and on interest of justice which is another exception to the rule in *Foss v. Harbottle* and statutory exceptions.

[10] Counsel for the plaintiff contended further that the 1st to 4th defendants have breached various provisions of the Capital and Markets Services Act 2007 and the Companies Act 1965 and that a case can only be struck out under O. 18 r. 19 RHC if it discloses no reasonable cause of action and only in plain and obvious cases. The plaintiff's statement of claim ought not to be struck out as there are triable issues by virtue of the various breaches by the 1st to 4th defendants. There are important questions of law to be tried and in the event the statement of claim is held to be defective, the plaintiff undertakes to amend the same.

[11] Counsel for the plaintiff reiterated that the court should bear in mind the provisions of O. 1A RHC on the justice of the case and not on technical non-compliance of any rule in the RHC.

Reasons For Decision

[12] After reading encls. 16 and 20, the Affidavit No 1 of the plaintiff, the written submissions of counsel for the 1st to 4th defendants and counsel for the plaintiff, I held that this was not a proper case for the court to exercise its discretionary power to strike out the plaintiff's claim under O. 18 r. 19(1)(a) RHC on the following grounds:

12.1 The plaintiff's statement of claim has disclosed reasonable causes of action based on fraud, breaches of fiduciary and statutory duties and negligence allegedly committed by the 1st to 4th defendants to the detriment of the 5th defendant.

12.2 The plaintiff's claim ought not to be struck out as the plaintiff has shown there are triable issues against the 1st to 4th defendants based on allegations of fraud, breaches of fiduciary and statutory duties and negligence.

12.3 The statement of claim raises important questions of law to be tried namely the:

a) rights of the plaintiff as a minority shareholder to bring a derivative action;

b) remedies of the 5th defendant in light of alleged wrongs committed by the 1st to 4th defendants causing the 5th defendant to suffer losses;

c) fiduciary and common law duties of the 1st to 4th defendants as Directors of the 5th defendant; and

d) statutory duties of the 1st to 4th defendants.

12.4 The statement of claim is adequate and not defective as the plaintiff has pleaded the following matters:

(a) the title of the writ of summons clearly states that this action is brought by the plaintiff as a minority shareholder of the 5th defendant and is brought for the benefit of the 5th defendant;

(b) paragraph 1 of the statement of claim states that the plaintiff is a minority shareholder of 2.79% shares of the 5th defendant and an Executive Director of the 5th defendant;

(c) paragraph 2 of the statement of claim states that the 1st defendant holds 12.94% shares of the 5th defendant and is a Director, Chief Operating Officer and Executive Chairman of the 5th defendant;

(d) the statement of claim also discloses that the 2nd defendant is the 1st defendant's wife and Director of the 5th defendant while the 3rd and 4th defendants are Independent Non-Executive Directors of the 5th defendant. It also states that the 5th defendant is a public-listed company;

(e) paragraph 7 of the statement of claim states that Petra Energy Bhd is a public listed subsidiary of the 5th defendant, where 5th defendant owns 64.6% shares of Petra Energy Bhd;

(f) paragraph 8 of statement of claim states the shareholders' mandate obtained by the 5th defendant is to divest 19,500,000 shares of Petra Energy Bhd ('Shareholders' Mandate");

(g) paragraph 13 of the statement of claim states that the divestment of the 2nd block of Petra Energy Bhd's shares which had contravened the Shareholder's Mandate has caused the 5th defendant to suffer losses amounting to RM500,000;

(h) paragraph 17 of the statement of claim states that the Board of Directors has given a mandate to divest the remaining block of the 5th defendant's shares totalling 54.62% ("Remaining Block") in accordance with the 7 conditions, which are as follows ("Conditions")

(i) that the Remaining Block must be divested *en bloc*;

(ii) the Remaining Block must be divested through an open tender;

(iii) a valuation of the Remaining Block must be done prior to the divestment;

(iv) divestment of the Remaining Block must not be less than the minimum net price of RM1.80 for each share;

(v) an announcement by the 5th defendant to Bursa Malaysia regarding the Board of Director's decision to divest the Remaining Block must be made immediately after the Board of Directors obtained the valuation of the Remaining Block;

(vi) the Board of Directors has the final decision whether or not to divest the Remaining Block; and

(vii) divestment of the Remaining Block must comply with all the aforesaid conditions;

(i) paragraphs 18 & 19 of the statement of claim state that after the Board of Directors' meeting was held to decide on the Conditions, the 1st defendant has appointed the 6th defendant to conduct a valuation of Petra Energy Bhd's shares and the 1st defendant appointed the 6th defendant as placement agent for the Remaining Block ("Appointment");

(j) the plaintiff was however, not aware of the Appointment and had only found out after the Appointment;

(k) paragraphs 21 and 22 of the statement of claim spell out the common law and statutory duties owed by the 1st to 4th defendants toward the 5th defendant;

(l) the breaches committed by the 1st to 4th defendants were described in detail, in paras 24 to 30 of the statement of claim;

(m) paragraphs 31 and 32 of the statement of claim clearly show that the 1st to 4th defendants were in *de facto* control of the Board of Directors;

(n) paragraph 37 of the statement of claim sets out the 1st to 4th defendants' breach of the Shareholders' Mandate;

(o) more serious are the facts set out in paras 38 and 39 of the statement of claim where the 1st to 4th defendants have caused the divestment of the Remaining Block in breach of the Conditions. The allegations contained in these paragraphs include the breach by the 1st to 4th defendants of Bursa's Listing Requirement which could expose the plaintiff as well as 5th defendant to sanctions by the Securities Commission;

(p) paragraph 48 of statement of claim sets out the losses suffered by 5th defendant;

(q) paragraphs 52 and 53 of the statement of claim set out the demand made by the plaintiff to the 1st to 4th defendants to prevent them from further divesting the Remaining Block; and

(r) the prayers that the plaintiff are seeking from the court are clearly set out in para 56(a) to (h) of the statement of claim.

12.5 An important issue to be determined by the court in this case is whether the plaintiff has established a *prima facie* case of *locus standi* to maintain the present suit. The 1st to 4th defendants have contended *albeit* impliedly, that the plaintiff has not.

12.6 In the case of *Tan Guan Eng & Anor v. Ng Kweng Hee & Ors* [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74, Edgar Joseph Jr. J (as he then was) held that the issue of *locus standi* should be disposed of as a preliminary issue. In so doing the learned

judge adopted the procedure laid down in *Prudential Assurance Co Ltd v. Newman Industries Ltd & Ors (No. 2)* [1982] 1 AU ER 354 where the English Court of Appeal held that prior to the determination of the substantive issues, it must first be determined that the company was in the control of the wrongdoers so as to found the minority shareholder's entitlement to bring the derivative action.

12.7 In determining the preliminary issue of *locus standi* it will be noted that the 1st to 4th defendants filed an unconditional Memorandum of Appearance. That being so, the 1st to 4th defendants cannot now complain that the plaintiff does not have *locus standi*. The Supreme Court has held that once a defendant files an unconditional appearance, it cannot later raise the argument of *locus standi* whether in an application to strike out or in the hearing of the suit itself or even an appeal. In *Alor Janggus Soon Seng Trading Sdn. Bhd. & 6 Ors v. Sey Hoe Sdn. Bhd. & Ors.* [1995] 1 CLJ 461 the Supreme Court per Hj. Mohd. Jemuri Serjan CJ (Borneo) held:

> [Page 475] The question that immediately comes to our minds is if the Defendants are sure in their own minds that the Plaintiffs have no *locus standi* or cause of action why did they not invoke O. 18 r. 19 or O. 33 r. 2 of the Rules of the High Court, 1980 because if they succeed in their applications on any of these orders the civil suit and the injunction itself would both collapse.
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> [Page 478] It was open to the Defendants to resort to O. 18 r. 19 or O. 33 r. 2 of our RHC but they chose not to do so but to bring up the *locus standi* issue on their application to set aside the injunction. On this ground alone, this appeal should succeed. It is too late now for the Defendants to invoke O. 18 r. 19 because they must have filed their **unconditional appearance,** thereby **depriving themselves of the right** to invoke O. 18 r. 19 …

This principle in *Alor Janggus* has been consistently applied by the High Court in the following cases:

(i) *Leong Peng Kheong & Anor v. Dawntree Properties Sdn Bhd* [2002] 1 CLJ 602 per Azmel Maamor (as he then was);

(ii) *Nga Sheau Sheau v. United Merchant Finance Bhd* [2004] 3 CLJ 243 per Low Hop Bing J (now JCA);

(iii) *Dato' Hari Menon v. Texas Encore LLC & Ors* [2005] 2 CLJ 688 at 697 per Low Hop Bing J (now JCA); and

(iv) *Lim Chon Beng v. Pulau Kembar Sdn Bhd* [2005] 6 CLJ 24 per Low Hop Bing J (now JCA).

12.8 From the plaintiff's averments in the statement of claim it could not be said that this was a plain and obvious case for striking out the statement of claim as disclosing no reasonable cause of action pursuant to O. 18 r. 19(1)(a). In the case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 the Supreme Court per Mohamed Dzaiddin bin Hj. Abdullah SCJ (as he then was) held that:

> [1] The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. This summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable.
>
> [2] So long as the pleadings disclose some [cause] of action or raise some question fit to be decided by the Judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out.

12.9 The court should not look behind the statement of claim to determine whether it discloses a reasonable cause of action. The only reasonable course is for the court to proceed on the basis that everything alleged in the statement of claim are true. In the cited Court of Appeal case of *Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Anor* [1998] 3 CLJ 253 it was held by Gopal Sri Ram JCA (as he then was) that:

> The principles governing an application made under Order 18 r. 19(1)(a) are well settled and have been stated by our courts on many occasions. For my part I can do no better than to quote from the judgment of Raja Azlan Shah J (as he then was) in *Mooney & Ors v. Peat, Marwick, Mitchell & Co & Anor* [1967] 1 MLJ 87 at p 88:
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> > It is firmly established that the power exercised under r. 4 (the precursor to Order 18 r. 19) 'is only perceived in cases which are plain and obvious so that a judge can say at once that a Statement of Claim as it stands is sufficient, even if proved, to entitle the

> plaintiff to the relief of which he ask for': see the judgment of Lindley MR in *Hubbuck & Sons v. Wilkinsons, Heywood & Clark Ltd* [1899] 1 QB 86, 91. Where the situation arises, the pleadings and particulars alone shall be considered and **all the allegations in it shall be presumed to be true,** and it is only on that assumption that any suitable case can be made for this application: see *Peck v. Russell* [1923] 4 FMS LR 32, 34. The court cannot and indeed is not empowered to look behind the pleadings and particulars if it discloses a reasonable cause of action. So long as the Statement of Claim discloses some ground of action the mere fact that the Plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out: see *Boaler v. Holder* [1886] 54 LT 298.

12.10 It is trite law that the mere fact that the claim is not likely to succeed at trial is not a ground for the case to be struck out. Please refer to *Bandar Builder*'s case *(supra)*.

12.11 The court should look at the justice of the case and not at technical non-compliance of any rule in the RHC. Reference is made to O. 1A RHC which provides:

> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

12.12 In the cited case of *Abdul Rahim bin Aki v. Krubong Industrial Park (Malacca) Sdn Bhd and 5 Ors* [1995] 4 CLJ 551, the Court of Appeal per Gopal Sri Ram JCA (as he then was) held:

> a derivative action is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision making organs, and will not, for that reason permit an action to be brought in its name. In these circumstances a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. But in so doing he must cite the company and the wrongdoers as defendants and the title to the action must reflect that the suit is being brought in a representative capacity. The Statement Claim or other pleading filed in support of the originating process must disclose that it is a

derivative action and recite the facts that make it so, and further, there must be an express statement in the pleading that the action is being brought for the benefit of the company. A plaintiff in a derivative action cannot thus sue in his own name, without indicating that he is bringing the action in a representative capacity and for the benefit of the company.

12.13 In this case, the plaintiff has pleaded in the title of the writ of summons and in paragraph 1 of the statement of claim that he is a shareholder of the 5th defendant and was bringing this action as a derivative action in his capacity as a minority shareholder of 2.79% shares, and for the benefit of 5th defendant. The plaintiff has cited the wrongdoers as the defendants. I am thus of the view that the plaintiff has satisfied the requirements as set out in the case of *Abdul Rahim bin Aki (supra)*.

12.14 In the decision of the Supreme Court of Western Australia in *Biala Pty Ltd v. Mallina Holdings Ltd (No. 2)* (1993) 11 ACLC 1082 at p. 1102, Ipp J considered it desirable to allow a minority shareholder to bring a derivative claim where the justice of the case clearly demanded that such a claim be brought irrespective of whether the claim fell with the confines of the established exceptions.

12.15 Further, I am of the view that this case comes within the exceptions to the rule in *Foss v. Harbottle* namely, that the cause of action is based on the alleged fraud on the minority and in the interests of justice. In the words of Edgar Joseph Jr J (as he then was) in *Tan Guan Eng*'s case *(supra)* the concept of 'control' of a company embraces a broad spectrum of positions within a company and that control could arise as the result of indifference or apathy. There would be an exception to the rule in *Foss v. Harbottle* if it could be shown that the wrongdoers were able "by means of manipulation of their position in the company" to ensure that the action is not brought by the company. The traditional view of "control" is one of ownership but there is new view of control – as to who has *de facto* control of the company.

12.16 In any event, I am of the view that there is no requirement in a pleading based on the alleged fraud on the minority to plead that the defendants are in control of the Board of Directors of the aggrieved company. There is also no

requirement for a demand to be made for the aggrieved company to seek legal remedies against the controlling Directors before a minority shareholder can commence legal proceedings.

In the cited case of *Chio Tan Seng & Ors v. Chong Chai Huat and Ors* [1997] 4 CLJ Supp. 116 Abdul Malik Ishak (now JCA) held:

> It is my considered opinion that under the first view even if fraud is not pleaded, which was not the case here, the derivative action would be allowed to proceed for the simple reason that if it is otherwise, the minority will be left with 'no other remedy'. This is in effect a sensible approach.

12.17 The plaintiff has pleaded breaches of s. 354(1)(b)(i) read with s. 354(2)(h), (k), (3)(a) and (b), (8) and (9) of the Capital and Market Services Act 2007 as well as breaches of s. 132(1)(1F) of the Companies Act 1965. Besides the Securities Commission and the Companies Commission of Malaysia having recourse against the 1st to 4th defendants, the plaintiff being a person whose interest would be affected by the breaches of the said Acts, should be allowed to apply for reliefs under the said Acts.

12.18 The issue of whether the plaintiff may rely on any one or all of the exceptions to the rule in *Foss v. Harbottle* is essentially a question of law and fact to be tried. The court will not entertain an application to strike out a claim where the pleading raises an important point of law. In the cited case of *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 2 MLJ 565, the Federal Court per Gopal Sri Ram JCA (as he then was) held:

> there is no dearth of authority dealing with the approach that a court should take when exercising its summary jurisdiction under O. 18 r. 19. The unanimous view is that the summary power ought not to be invoked save in a plain and obvious case. An examination of the record provided demonstrated that this was not such a case. There were several issues of law that required mature consideration. And there were several issues of fact that were capable of resolution only after taking *viva voce* evidence. There was therefore no justification for striking out the writ in this case *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Bhd*

[1993] 4 CLJ 7 followed.

12.19 As I am of the view that the statement of claim is not defective, there was no need for the court to exercise its power to direct an amendment to be made to the statement of claim as vested in the court by O. 18 r. 19 RHC. This power is separate and distinct from the power conferred by O. 20 r. 5(1) to permit an amendment on the application of the plaintiff himself. Please refer to the Court of Appeal case of *Shahidan Shafie v. Atlan Holdings Bhd and Anor* [2005] 3 CLJ 793 per Gopal Sri Ram JCA (as he then was).

12.20 I was also mindful of the fact that as there is no issue of time bar under the Limitation Act 1953 in this case, the plaintiff could always file a fresh suit in the event the claim was struck out by the court due to defective pleading in the statement of claim.

12.21 Importantly, in this case the alleged defective pleadings or the lack of pleadings do not occasion any disadvantage or cause any prejudice to the 1st to 4th defendants as the statement of claim as it stands is sufficient for the 1st to 4th defendants to know the causes of action relied upon and for them to meet the case appropriately in their defence. There is no undue surprise sprung by the plaintiff on the 1st to 4th defendants.

[13] Accordingly, the applications (encls. 16 & 20) were dismissed with costs.